7 FAM 1100 APPENDIX K DEFENSES OF UNAWARENESS, IMPOSSIBILITY OF PERFORMANCE, CONSTRUCTIVE COMPLIANCE, AND OFFICIAL MISINFORMATION

(CT:CON-449; 03-25-2013)
(Office of Origin: CA/OCS/L)

7 FAM 1110 APPENDIX K INTRODUCTION

(CT:CON-449; 03-25-2013)

a. Acquisition of U.S. citizenship by birth abroad under U.S. nationality laws, as explained in 7 FAM 1100, can depend on whether certain actions have been taken on the part of both the U.S. citizen (parent(s)) with the original claim to citizenship, and the applicant to acquire and retain citizenship. This appendix discusses some historical defenses pertaining to the retention provisions of former INA 301(b). 7 FAM 1100 Appendix L explains how consular officers and passport specialists administer cases that were subject to the former retention provisions today. The purpose of 7 FAM 1100 Appendix K is to provide historical context for these issues. These defenses are rarely employed today and any questions about this subject should be directed to the Office of Legal Affairs, Overseas Citizens Services, Bureau of Consular Affairs (CA/OCS/L) (*Ask-OCS-L@state.gov*).

b. While U.S. nationality laws have evolved in the past 100 years, U.S. courts have continued to conclude that the Congress has the right to impose conditions under which a U.S. citizen born outside of the United States and its outlying possessions, may acquire, and retain, citizenship.

> "Persons not born in the United States acquire citizenship by birth only as provided by Acts of Congress."
>
> United States v. Wong Kim Ark, 169 U.S. 649 (1897)
>
> "Congress reasonably may demand that the child show sufficient ties to this country on its own rather than through its citizen parent in order to be a citizen."
>
> Miller v. Albright, 523 U.S. 420 (1998)

c. The Naturalization Clause of the U.S. Constitution states that "The Congress shall have power ... [t]o establish a uniform Rule of Naturalization." U.S.

Constitution Article 1, Section 8. The Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that "[e]very society possesses the undoubted right to determine who shall compose its members." Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).

d. The Immigration and Nationality Act (INA) itself provides no "exemption"; i.e., no authority to waive or modify its requirements.

e. With respect to the retention requirements of former section 301(b) INA, however, the Bureau of Consular Affairs (CA) does accept several affirmative defenses which render those requirements inapplicable and which individuals may assert to excuse their non-compliance. Those defenses involve unawareness of a claim to citizenship, impossibility of complying with the retention requirements, and official misinformation. Prior to 1995, these defenses were the only available means, other than naturalization, by which persons whose citizenship ceased under the former section 301(b) INA could have their citizenship restored. After 1995, the procedures explained in 7 FAM 1100 Appendix L apply.

f. The above defenses, however, must be distinguished from a claim that the individual was not aware of specific retention requirements. In Rucker v. Saxbe, 552 F.2d 998 (1977), the court found that the Government has no affirmative duty to inform citizens residing abroad of changes in U.S. nationality laws on a continuing basis, and that it was not barred from applying the retention requirements to Mr. Rucker by its failure to inform him directly of the amendments to those requirements.

g. The defenses do not apply to physical presence or residence requirements for transmittal of U.S. citizenship. (See Runnett v. Schultz, 902 F. 2d 782 (1990); Drozd v. INS, 155 F. 3d 81 (1998); Tullius v. Albright, 240 F.3d 1317 (2001).)

7 FAM 1120 APPENDIX K DEFENSE OF UNAWARENESS OF U.S. CITIZENSHIP

(CT:CON-449; 03-25-2013)

a. Origin of the Unawareness Doctrine: The doctrine set forth in the Attorney General's opinion of May 24, 1962, in the case of Freddie Norman Chatty-Suarez, 9 I. & N. Dec. 670 (1962), and by the courts of appeals in various cases such as Perri v. Dulles, 206 F.2d 586 (3rd Cir. 1953); Petition of Acchione, 213 F.2d 845 (3rd Cir. 1954); and Rogers v. Patokoski, 271 F.2d 858 (9th Cir. 1959), that potentially expatriating acts performed while a person was unaware of a possible claim to U.S. citizenship do not cause loss of nationality, has also been applied to cases involving former section 301(b) INA. Under that doctrine, any person wholly unaware of a possible claim to U.S. citizenship should not be held to have ceased to be a citizen by failure to meet the retention requirements.

b. Knowledge of Parent's Citizenship Does not Preclude Unawareness Defense: In Rogers v. Patokoski the Court held that expatriating acts committed by an individual while he was unaware of his claim to U.S. citizenship did not cause him to lose his U.S. citizenship. Despite the applicant's admission in that case that he knew that his father was a U.S. citizen, the Court accepted his claim of unawareness of his own citizenship since there was no evidence to the contrary. His lack of awareness was demonstrated by evidence that he had entered the United States on several occasions as a nonimmigrant. In effect, the Court stated that the applicant met the burden of proof on the basis of his own credible and convincing testimony. (Although this case does not directly relate to the retention requirements, its development of the notion of unawareness can be applied by analogy in this context.) The former Immigration and Naturalization Service Administrative Appeals Unit also has held that awareness of a claim to U.S. citizenship requires more than the knowledge of the birthplace or citizenship of the parent.

c. Unless there was direct evidence of an applicant's awareness of his claim to U.S. citizenship, the Department accepted the applicant's credible and convincing statements of unawareness. Persons who learned of their possession of U.S. citizenship after reaching age 26 were held not to have forfeited their U.S. citizenship by failing to enter the United States before their 26th birthday to begin compliance with the retention requirements of former section 301(b) INA. There was no requirement that such persons later enter the United States in order to keep their citizenship. An individual who was aware before age 26 that he or she was a U.S. citizen but assumed that such citizenship had been lost could claim unawareness as a defense against the operation of former section 301(b) INA.

d. Persons Aware of Citizenship But Unaware of Retention Provisions: Ignorance of the retention requirements does not excuse an individual's failure to comply with them if that person was aware of a claim to U.S. citizenship before the date on which that person would have been required to begin compliance with the retention provisions. For instance:

   (1) Rucker v. Saxbe, 552 F.2d 998 (1977), indicates that unawareness of the requirements of section 301(b), when accompanied by an awareness of a claim to U.S. citizenship, does not prevent application of the retention requirements. The Supreme Court declined to review Rucker.

   (2) In Rucker, the court found that the Government has no affirmative duty to inform citizens residing abroad of changes in U.S. nationality laws on a continuing basis, and that it was not barred from applying the retention requirements to Mr. Rucker by its failure to inform him directly of the amendments to those requirements. This opinion coincides with the Department's longtime belief that citizens are obliged to keep themselves informed of the duties imposed on them by their citizenship.

e. Evidence In Support Of Unawareness: The following explanation of the pre-

1995 Department adjudication process is provided for historical reference.

(1) Prior to 1995, the consular officer conducted an interview with the applicant about claims to unawareness, but it was not necessary to conduct an in-depth investigation into the applicant's background in order to determine if he/she had a valid unawareness claim. There was no requirement, for example, for family members to be interviewed. The applicant's statement under oath was accepted absent direct evidence contradicting it. Examples of direct evidence could include, but are not limited to:

(a) The applicant was previously documented as a U.S. citizen;

(b) The applicant previously applied for documentation, and the application was disapproved; and

(c) The applicant previously inquired regarding acquisition of U.S. citizenship.

(2) In some cases, knowledge of a claim could be imputed to the applicant if an applicant's sibling previously inquired or applied for documentation as a U.S. citizen. The use of such evidence to counter a claim to unawareness required not only a statement from the sibling, but a thorough development of the sibling's awareness case as well. There is no requirement to query each sibling and parent of the applicant. Posts attempted to develop only that evidence which appeared to refute the applicant's statements. In most cases, this did not require a personal appearance by any sibling, but the post inquired whether any siblings were documented as U.S. citizens.

(3) Posts may consider evidence which is circumstantial but nevertheless probative in assessing a claim of unawareness. For example, there has been a substantial American presence in the Philippines since late in the 19th century. An unawareness claim from an applicant from the Philippines with an English surname might raise questions that a similar claim in the United Kingdom would not raise. Thus, there may be historical or cultural factors which would be taken into consideration.

f. Developing an Unawareness Case:

(1) Applicants completed a passport application and citizenship questionnaire, and documented in further detail as necessary when and under what circumstances they learned of their claim to U.S. citizenship. The application was supported by the required evidence of the acquisition of U.S. citizenship.

(2) Once acquisition of U.S. citizenship was established, the consular officer would determine whether the applicant was subject to but failed to comply with applicable retention provisions. If retention requirements were not applicable or were complied with, then the issue of unawareness was not relevant and would be disregarded. After 1995, if applicable retention

requirements were not complied with, the consular officer would confirm that the applicant wishes to develop an unawareness defense rather than seek citizenship restoration under section 324(d) INA (see 7 FAM 1100 Appendix L).

(3) The consular officer (or passport specialist) would interview the applicant and conduct any checks deemed necessary, such as lookout, post and/or Department records which may assist in determining the validity of the unawareness claim.

(4) The consular officer would resolve any loss of nationality issue, per 7 FAM 1200.

(5) If the consular officer found unawareness credible, and all acquisition and loss of nationality issues were satisfactorily resolved, citizenship could be documented based on the unawareness doctrine with prior CA/OCS/L (*Ask-OCS-L@state.gov*) approval. Upon determining that the evidence is sufficient to support the holding that the applicant was unaware of a claim to U.S. citizenship until after the date on which citizenship would have ceased for failure to meet the retention requirements, when authorized by CA/OCS/L, the consular officer would execute a certification along the following lines: "I have reviewed the case of (name of applicant) and determined that (he/she) was unaware of (his/her) claim to U.S. citizenship before (date). I have therefore determined that (he/she) should be regarded as having constructively complied with the retention requirements of (applicable section of law) and may be documented as a U.S. citizen."

Date of Certification Consular Officer's Signature,
Officer's Typed Name,
Officer's Title, Name of Post

(6) The consular officer would attach this certification to the passport application.

7 FAM 1130 APPENDIX K DEFENSE OF IMPOSSIBILITY OF PERFORMANCE

(CT:CON-348; 12-07-2010)

a. Circumstances Giving Rise to Impossibility of Performance: A second defense to failure to fulfill retention requirements was impossibility of performance. "Impossibility of performance" means that a U.S. citizen subject to the retention provisions was prevented from complying with those provisions by forces over which he or she had no control. This excuse is most likely to be substantiated in totalitarian states where government permission was required to depart the country. (This is not to be confused with an instance in which a person considered the possibility of his or her relocation to the United States to

be merely difficult, inconvenient, or financially disadvantageous.)

b. Evidence of Impossibility of Performance: In general terms, claims of impossibility of compliance with retention requirements are supported by evidence that compliance was attempted prior to the claimant's 26th birthday. Since claims of inability often require evidence of positive action on the part of the applicant, they have generally been easier to prove than unawareness claims (which require proving a negative). However, it is not sufficient to merely assert that compliance was attempted. While cases may not be adjudicated solely under a blanket acceptance of inability for periods during which compliance is known to have been impossible, posts may have knowledge that, during certain periods, persons were not permitted to leave a country, and that it was common knowledge during those periods that efforts to leave the country would entail substantial risk. For example, we know that emigration from most Eastern European countries was extremely difficult after the Second World War. Thus, should a former U.S. citizen present an application based on a credible claim that he/she would have traveled to the United States to comply with retention requirements but found such travel forbidden, directly or indirectly, the consular officer would accept that claim as an effective defense to the retention requirements. Financial impossibility of performance was not an accepted defense.

c. Handling Cases Involving Impossibility of Performance: Cases involving impossibility of performance would be handled in the same general manner as unawareness cases. Evidence of the inability to comply with the retention requirements would be attached to the application submitted to the Department. Such evidence would include a statement describing the applicant's claims, the post's knowledge of objective conditions in the applicant's area of residence during the period of time in question or evidence supporting the applicant's assertions, and the officer's evaluation of the case. If the claim is accepted by the post, a consular officer's certification similar to the one shown in 7 FAM 1133.5-17 (f)(5) would be made a part of the file. If the claim is found not credible, the consular officer may proceed with administration of the 324(d) oath.

7 FAM 1140 APPENDIX K DEFENSE OF OFFICIAL MISINFORMATION

(CT:CON-348; 12-07-2010)

a. Circumstances Giving Rise to Defense of Official Misinformation: Noncompliance with the retention requirements may also be excused in cases in which the applicant can affirmatively demonstrate that he (she) was misinformed by an agent of the Federal Government regarding the retention requirements or, in rare cases, the underlying claim to citizenship. (In this context, an agent is an employee of the Federal Government who might

reasonably be expected to have knowledge of citizenship matters.) Such cases arise very infrequently. It is incumbent upon the applicant to provide convincing evidence of misinformation beyond a simple self-serving statement.

b. Examples of Official Misinformation:

(1) One example of a possible misinformation defense is a case where the applicant was issued a full-validity passport when, in fact, the passport should have been limited to the last day on which the person could have complied with the retention of citizenship provisions.

(2) Conversely, an incorrect denial of a legitimate claim to citizenship could lead to a failure to comply with retention requirements. The denial of passport services, for example, could result in a citizen's inability to meet retention requirements. That denial would anchor a strong affirmative defense on retention in the event of a correct adjudication of the underlying claim at some later date.

(3) On occasion, applicants may present official correspondence which appears to have inadvertently misrepresented retention requirements or other laws, policies, or procedures, resulting in a failure to comply.

c. Handling Cases Involving Official Misinformation: Posts do not have to submit to the Department for advisory opinion cases in which an applicant subject to the retention provisions of former section 301(b) INA claims that non-compliance was a direct result of misinformation by an employee of the Federal Government. However, an applicant claiming official misinformation must provide convincing evidence of the misinformation, such as official correspondence, previously issued documentation of U.S. citizenship, and the like. Post may wish to check Department citizenship files for evidence supporting or disproving the applicant's claims. Cases involving official misinformation would be handled in the same manner as unawareness and impossibility of performance cases.

7 FAM 1150 APPENDIX K THROUGH 7 FAM 1190 APPENDIX K UNASSIGNED